FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. ..219...

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, *Appellants*,

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

APPELLANTS' BRIEF IN REPLY TO MOTIONS OF APPELLEE TO DISMISS OR AFFIRM.

ROBERT S. MARX,
HENRY H. FOWLER,
Counsel for Appellants.

Of Counsel:
NICHOLS, WOOD, MARX & GINTER,
900 Traction Bldg.,
Cincinnati, Ohio.

FOWLER, HAWES & SYMINGTON,
1703 K St., N. W.,
Washington 6, D. C.

April 5, 1948.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLEED THROUGH = POOR COPY

INDEX.

Page

Appellants' Brief in Reply to Motions of Appellee to Dismiss or Affirm 1

I. While this Appeal Was Fully Justified When Taken, the Case Now Seems to be Moot..... 2

II. The Three-Judge Court Order Below is Appealable, and Within this Court's Appellate Jurisdiction..... 4

III. Conclusion 9

CASES:

Department of Banking v. *Pink*, 317 U. S. 264..... 8
Fleming v. *Rhodes*, 331 U. S. 100 7
Jameson & Co. v. *Morgenthau*, 307 U. S. 171..... 7
Roche v. *Evaporated Milk Association*, 319 U. S. 21 9
Stratton v. *St. Louis Southwestern Ry.*, 282 U. S. 10 9

STATUTES:

Act of August 24, 1937 (c. 754, sec. 3, 50 Stat. 751, 752, 28 U. S. C. Sec. 380a) 3, 4, 7
Act of April 6, 1942 (c. 210, sec. 3, 56 Stat. 199, 28 U. S. C. Sec. 792) 5, 7
Public Law 395, 80th Cong., 1st sess., approved December 30, 1947:
Sec. 4(b) 1, 2, 3, 5, 8, 10
Sec. 6(a) 2

MISCELLANEOUS:

H. Rep. No. 1490, 75th Cong., 1st Sess. 7
H. Rep. No. 1677, 77th Cong., 1st Sess. 6
H. Doc. No. 512, 80th Cong., 2d Sess. 2
Sen. Rep. No. 888, 80th Cong., 2d Sess. 3
Sen. Rep. No. 900, 80th Cong., 2d Sess. 3
S. J. Res. 186, 80th Cong., 2d Sess. 3
81 Cong. Rec. 8703 7

BLEED THROUGH – POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 719...

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, *Appellants*,

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

APPELLANTS' BRIEF IN REPLY TO MOTIONS OF APPELLEE TO DISMISS OR AFFIRM.

This statement is filed by appellants, pursuant to Paragraph 3 of Rule 7 of this Court, in reply to motions filed by the appellee on March 16, 1948, to dismiss or affirm the appeal in this cause.

The appeal was addressed to an order of a three-judge court entered on January 27, 1948, which held Section 4(b) of Public Law 395, 80th Cong., 1st Sess., constitutional, with a majority of the court holding that there was no substantial question of constitutionality., and remitted the cause to a single judge "for appropriate action". The action had

been commenced by appellants in the District Court of the United States for the District of Columbia to enjoin appellee from enforcing this section of the law and an order issued thereunder on the ground that Section 4(b) was unconstitutional. Appeal to this Court was duly applied for, allowed, and filed on February 26, 1948.

I. While this Appeal Was Fully Justified When Taken, the Case Now Seems to be Moot.

Public Law 395 was enacted on December 30, 1947, and Section 4(b), the portion challenged in this action, providing for the allocation of grain for the production of distilled or neutral spirits for beverage purposes, expired on January 31, 1948. The unprecedentedly short duration of the regulatory authority thus conferred (31 days) was due to the "stop-gap" character of this particular provision, it being designed to cover an interim period until a more complete and mature consideration of the problem by the Congress could be afforded.

During the early weeks in February following the entry of the order below (January 27, 1948) and the expiration of the legislative authority (January 31, 1948) the enactment of legislation continuing this authority was imminently threatened.[1] This was true up to and through Febru-

[1] (a) On January 29, 1948, the President of the United States, acting pursuant to Section 6 A of Public Law 395, sent a message to Congress recommending that it provide for the exercise at least until October 31, 1948, of the powers conferred by Section 4(b), the legislation challenged in this action. He said:

> "It is contemplated that if the present power to allocate grain is continued beyond January 31, 1948, substantially the same procedure as that provided for in the present order will be used, with such modifications as may be required should the Congress enlarge the grant of authority to include the control of additional uses as recommended in this proposal."

See H. Doc. No. 512, 80th Cong., 2nd Sess., Message from the President of the United States.

(b) On February 11, 1948, the Joint Committee on the Economic Report, to whom the President's Message was referred, recom-

BLEED THROUGH – POOR COPY

ary 26, the date of the expiration of the thirty-day appeal period allowed in this type of case under the Act of August 24, 1937 (c. 754, Sec. 3, 50 Stat. 751, 752, 28 U.S.C. 380a).

In order to save their rights to challenge the legislative authority to enact Section 4(b) which seemed about to be continued in a similar form with identical effect, appellants felt it necessary to file their petition for direct appeal. It was their intention at the time the appeal was taken to prosecute it vigorously in event the legislative enactment challenged in this case was renewed as threatened. Appellants saw no other way to obtain an expeditious ruling from this Court on the constitutionality of the type of legislation challenged. To have waived their right to appeal in this case, awaiting the passage of new legislation and challenging it in the District Court by a new action would have been to run a grave risk that, given a similar decision below, the appeal could not have been perfected, heard and determined by this Court before the expiration of its present term. Hence, appellants adopted the only course by which they could adequately protect their rights and obtain

---

mended that Congress enact the necessary legislation, setting forth for both Houses its view of the need for such a measure. See Sen. Rep. No. 888, 80th Cong., 2nd Sess.

(c) On February 20, 1948, the Senate Banking and Currency Committee reported out a joint resolution effectuating this recommendation. See Sen. Rep. No. 900, 80th Cong., 2nd Sess.

(d) On February 26, 1948, the day the petition for appeal in this action was allowed, the Senate passed S. J. Res. 186, which continued the authority conferred in Section 4(b) of Public Law 395 by re-enacting title III of the Second War Powers Act, 1942, as amended "with respect to allocation and inventory control of grain for the production of ethyl alcohol, including but not limited to distilled spirits and neutral spirits." This authority would extend until October 31, 1948. It would constitute a continuance of Section 4(b) by reason of a provision under which the executive authorities could reduce the allotment to any distilling plant by the amount used between January 31, 1948, and the effective date of any new order.

(e) S. J. Res. 186, as it passed the Senate was introduced in the House on Feb. 27, 1948, and referred to the House Banking and Currency Committee. No public notice of any action by that Committee is available.

an expeditious ruling from this Court on the important constitutional principles involved in this case in event such a ruling became necessary.

However, during the month that has elapsed since their petition for appeal was allowed, the legislative threat to extend the authority challenged in this action beyond January 31, 1948, the date of its expiration, has subsided, and the renewal legislation is apparently not being pressed for early enactment in the House, having only passed the Senate. Under these circumstances candor calls for a recognition of the validity of that part of the appellee's position in its motion to dismiss which contends that the case is moot by virtue of the expiration of the statutory provision under attack. Appellants would certainly not so concede if the legislation threatened at the time they filed this appeal had been pressed through to final enactment or was being currently pressed in such a manner as to indicate early passage. However, under the current situation, it would seem that there is no subject matter on which the judgment of this Court could operate; under those circumstances, it seems well settled that the Court will not proceed to adjudication and the case is moot.

II. The Three-Judge Court Order Below is Appealable, and Within this Court's Appellate Jurisdiction.

Under these circumstances, appellants are reluctant to burden this Court with a detailed reply to the other points made in the government's motion to dismiss, i.e., that the order below of January 27, 1948, upholding the constitutionality of Section 4(b) was clearly correct, and that such order is not reviewable by direct appeal to this Court. They are of the opinion that these points are not now necessary to a final disposition of the case in view of the agreed position that the case is moot.

However, in the light of the government's contention that appellants adopted an improper procedure in seeking review by this Court, a brief treatment of their reasons for having invoked its appellate jurisdiction under the Act of

BLEED THROUGH – POOR COPY

August 24, 1937, seems in order. Appellants' reasons for believing that Section 4(b) is unconstitutional and that the issue of constitutionality is a substantial one are set forth in the Statement as to Jurisdiction, filed with their Petition for Appeal on February 26, 1948, and will not be repeated here.

The government's contention that the three-judge order of January 27, 1948, is not appealable seems to rest on three grounds, namely:

(1) That this Court cannot review a determination of a three-judge court that there is no substantial question of constitutionality; asserting, in effect, that the only proper procedure was the entry of an order of dismissal by a single judge, with an appeal to the local Court of Appeals.

(2) That the three-judge order does not grant or deny an interlocutory or permanent injunction *in haec verba* so as to permit an appeal under the Act of August 24, 1937.

(3) That, in any event, such a jurisdictional question should be raised by mandamus, rather than appeal.

These contentions ignore the mandatory effect of the Act of April 6, 1942 (c. 210, Sec. 3, 56 Stat. 199, 28 U. S. C. Sec. 792), which reads as follows:

> "In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3...., any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and

determine any application for, or vacation of, an interlocutory injunction, *or dismiss the action, or enter a summary or final judgment on all or any part of the action: Provided, however,* That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion." (Emphasis added.)

The legislative history of this provision seems to indicate a clear Congressional intent to preclude the procedure prescribed by the appellee on constitutional issues. Among the prominent sponsors of this legislation were the American Bar Association and the Association of the Bar of the City of New York, the latter having written on December 18, 1941, to the House Committee considering the bill, as follows:

"The bill achieves a desirable result in making clear (a) that the Rules of Civil Procedure apply to the preliminary proceedings in actions which must be determined by three-judge courts, and (b) that procedural preliminaries (such as discovery, bills of particulars, the taking of depositions, etc.) may be supervised by a single judge. In providing that the single judge may not dismiss an action, the bill would overrule decisions holding that a single judge may dismiss an action determinable by a three-judge court when the complaint shows on its face that the court lacks jurisdiction (*Ex parte Poresky,* 290 U. S. 30; 3 Moore, Federal Procedure, p. 3566). In this, too, the bill is desirable since in many instances the determination whether on its face a complaint shows that the court has jurisdiction involves a preliminary determination of the constitutionality of the statute or ruling under attack." (House Report No. 1677, 77th Cong., 2d Sess. p. 5.)

The precise question posed by the proceedings below in relation to this Act seems to be a novel one, but the issue is simple. Can a *three-judge court* under the circumstances here involved preclude appellants from a direct ap-

BLEED THROUGH – POOR COPY

peal to this Court by determining that there was no substantial question of constitutionality, and remitting the cause to a single judge "for appropriate action", after it had already determined, upon full hearing, that the challenged Act was constitutional?[2] It would seem that a negative answer to this question is required where, as here, there has been a "hearing and determination" by three judges under the statutory scheme, as clarified by the 1942 Act.

(1) A determination *by a three-judge court* that the constitutional question is not "substantial" will not divest a plaintiff litigant of its right to appeal directly from that ruling to this Court.

If it were decided that the ruling had such an effect, appellants' only remedy would seem to be to appeal the question (i. e., whether the constitutional issue was substantial) to the Circuit Court of Appeals, obtain a reversal, have the three-judge court reconvene, modify its order on this point, and enter a final decree which, only then, could be appealed to this Court. It is submitted that such a procedural merry-go-round is contrary to the objectives of the Act of August 24, 1937,[3] and specifically precluded by the clarifying Act of April 6, 1942. The Supreme Court, therefore, is the appropriate appellate tribunal which can and should review *the three-judge holding below,* including its purported disclaimer of jurisdiction. The cases cited by the government, particularly *Jameson & Co.* v. *Morgenthau,* 307 U. S.

---

[2] At no time before or during the hearing was the question of "substantially" raised. Indeed, the government asserted, both orally and in its brief supporting the consolidation of appellants' two actions, that the constitutional issue was a substantial one.

[3] That a prime purpose of this Act was to provide expeditious review of federal constitutional issues by direct appeal to this Court, is clear from its legislative history. See Conference Report, H. Rep. No. 1490, 75th Cong. 1st Sess., p. 6; Comments of Representative Sumners, House Manager, 81 Cong. Rec. 8703, August 11, 1937; *cf. Fleming* v. *Rhodes,* 331 U. S. 100, 104, note 6.

171, are inapposite to this proposition. In that case, this Court necessarily determined whether or not the question raised was a substantial one. Its jurisdiction to determine whether or not its jurisdiction is properly invoked in a particular case can hardly be denied.

(2) Appellants' complaint in Civil Action No. 90-48, appealed herein, did not attempt to burden the three-judge court with separate issues not involving constitutionality.[4] It dealt solely with the constitutionality of Section 4(b) under challenge. Hence, the order of January 27, 1948, by holding the challenged section constitutional, necessarily disposed of that case in all its phases. It necessarily denied the injunction sought. It would thus seem unnecessary that the order appealed from deny the injunction and dismiss the complaint *in haec verba*.

The order entered was tantamount to a "final and reviewable judgment" since it "ended the litigation by fully determining the rights of the parties." See *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Even assuming *arguendo* the propriety of the remittitur to the single judge, there was nothing left for him to do but enter an order, more formal in character, denying the injunction. This was purely a "ministerial act" and could not affect the "final and reviewable" nature of the order of January 27, 1948. See *Department of Banking* v. *Pink*, *supra*.

Under these circumstances, it would seem that even though this Court should feel that a mere determination by a three-judge court that no substantial question was presented was not necessarily appealable directly to it, it would not deny the propriety of such an appeal when, as in this case, after a full hearing, conceded at bar by both parties to be final in character, the three-judge court held that the statute was constitutional, thereby precluding the plaintiffs

[4] I. e., Modification of appellee's allocation order which was sought in the separate Civil Action No. 91-48; this was consolidated with the constitutional case only after motion of the appellee and over appellants' objection.

BLEED THROUGH – POOR COPY

from the only injunctive relief sought in Civil Action No. 90-48.

(3) Appellants could perhaps have invoked mandamus to secure the entry of a formal decree by the three-judge court denying the injunction and dismissing the complaint. They submit, however, that this extraordinary remedy is not appropriate where the question is one of form rather than substance, and where the result would be to require this Court to pass twice upon the question. For, if this Court should agree with appellants that the claim of unconstitutionality was substantial, it would be forced to grant the writ of mandamus whether or not, in the last analysis, it considered the statute constitutional. Such duplication would seem unnecessary and contrary to the statutory purpose of direct and expeditious review in such cases. It is well settled that mandamus should not be sought where a remedy by appeal is available. *Cf. Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10, at p. 16; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21. In particular, it would seem presumptuous, and a useless thing, to seek mandamus from this Court to secure an appealable order in form as well as substance, where, as here, the case has become moot.

III. Conclusion.

Appellants feel, therefore, that the order appealed from is an appealable order within the statutory jurisdiction of the three-judge court under the Act of August 24, 1937, and that this Court necessarily has jurisdiction to review it on direct appeal. Such jurisdiction, under the present posture of the case, would seem to require only a determination that the case is moot. Should the Court feel, however, that it was necessary or desirable for it to consider any question other than that on which there is agreement, namely that the case is moot, counsel for appellants will be glad of the opportunity to be heard for such

time as the court will permit. They have been and still are of the opinion that:

(1) Section 4(b) of Public Law 395 was unconstitutional.

(2) The determination of the three-judge court below that the section was constitutional, and of a majority of that court that no substantial constitutional question was presented, is error.

(3) The order of January 27 is a final and reviewable order.

Accordingly, appellants join only in that portion of the motion by appellee that would dismiss the appeal on the ground that the case is moot because of the expiration of the statute challenged and the absence of any imminent threat of its re-enactment.

Respectfully submitted,

ROBERT S. MARX,
HENRY H. FOWLER,
Counsel for Appellants.

Of Counsel:

NICHOLS, WOOD, MARX & GINTER,
900 Traction Bldg.,
Cincinnati, Ohio.

FOWLER, HAWES & SYMINGTON,
1703 K St., N. W.,
Washington 6, D. C.

April 5, 1948.